

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

NATIONAL STEEL & SHIPBUILDING
COMPANY

and

Cases 21–CA–39300
21–CA–39395

JOSHUA J. DARNELL, an Individual

and

Case 21–CA–39309

JOSH ALAN MILLER, an Individual

and

Case 21–CA–39374

GARY ALLEN PINKHAM, an Individual

Winkfield Twyman, Esq., for the General Counsel.

James J. Kelley and Lincoln O. Bisbee, Esqs.,
(*Morgan, Lewis & Bockius, LLP*) of Washington, DC
for the Respondent.

Joshua J. Darnell, Joshua Alan Miller, and Gary Allen Pinkham,
Individuals, Charging Party, *Pro se*.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Diego, California, on November 8 and 9, 2010. Joshua J. Darnell, Josh Alan Miller, and Gary Allen Pinkham filed their charges on April 5, April 14, and June 7, 2010¹ and the General Counsel issued the order consolidating cases, consolidated complaint and notice of hearing on August 21, 2011. That complaint alleges that National Steel & Shipbuilding Company (NASSCO) violated Section 8(a)(3) and (1) by issuing a written warning to Pinkham. The complaint also alleges that NASSCO violated Section 8(a)(1) by admonishing employees because they allowed another employee to speak on their behalf, attempting to discourage employees from engaging in concerted activities by stating that employees are grown men and can handle issues themselves without the assistance of other employees, attempting to discourage an employee from engaging in union activities by accusing the employee of getting other employees involved with the Union and causing problems within their department by their union activity, telling an employee not to get involved in any other employees' disciplinary issues, telling an employee that the employee was not to steer employees towards the Union, telling an employee that the employee was not to discuss union issues with other employees unless he was shop steward,

¹ All dates are in 2009 unless otherwise indicated.

threatening an employee with discharge for engaging in union or other concerted activities, threatening to terminate an employee because the employee engaged in concerted activity by challenging the discipline of another employee at a safety meeting of employees, and threatening an employee with a write-up when the employee engaged in concerted activities by telling riggers they needed to be at least 35 feet away from all “hot” work.² NASSCO filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, and as corrected agency and supervisory status. NASSCO denied violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel³ and NASSCO, I make the following.

² At the hearing I granted the General Counsel's motion to withdraw paragraph 11(b) of the complaint.

³ The General Counsel's brief suffers in a number of ways that warrant comment. On page 16 the General Counsel discusses the adverse inference that may be drawn from NASSCO's failure to call or question witnesses and states “Such an inference is appropriate here where Respondent failed to call any of its employees” This statement is erroneous both as a matter of law and as a matter of fact. The adverse is not properly drawn against NASSCO's failure to call employees. And NASSCO did call Hubrins, an employee at the time, as a witness.

Next, the General Counsel's brief addresses the issue of what happens when a union fails to arbitrate a matter that has been deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies*, 268 NLRB 557 (1984). A necessary corollary to these cases is that if a union fails to either settle the grievance or arbitrate the matter, the complaint must generally be dismissed. Otherwise deferral to the grievance arbitration procedure is not required but rather is voluntary. Here, the General Counsel contends that “if the Union has, for whatever reason, dropped the grievance” the Regional Director may issue a complaint. The General Counsel cites *Electric Motors & Specialties*, 149 NLRB 131 (1964). But that case is clearly no longer good law for the position cited because it was decided long before *Collyer*. And in any event the Board made no such finding in that case. Rather, had the General Counsel properly cited the case—149 NLRB 131, 137, it would have been apparent that this was a finding by the Trial Examiner and not the Board. The General Counsel also cites *Whirlpool*, 216 NLRB 183, 186 (1975), for the same proposition. But apparently the General Counsel has not read that decision carefully. The Judge there carefully pointed out how *Collyer* requires a union to pursue an issue to the grievance-arbitration procedure whether the union wants to or not. Rather, *Whirlpool* stands for the settled exception to *Collyer* deferral when the interests of the union are not sufficiently aligned with the interests of the grievant thereby raising doubt as to the adequacy of the union's representation of the grievant in arbitration. In other words, the General Counsel's brief misstates Board law under *Collyer* and its progeny.

And continuing on the matter of accurately citing cases, the General Counsel's brief includes a potpourri of peculiar case citations including *B&C Cartage, Inc.*, “2008 WL 4934015 (November 14, 2008),” and “*In re*” *Uzi Einy*, 352 NLRN 1178 (1183 2008) and “*In re*” *Mall Contractors of America*, 347 NLRB “No. 88, 1160 n.7” “(no year cited)” and *St. George Warehouse, Inc.*, “2005 WL 77043”. The quoted portions highlight the points I make.

Finally, the General Counsel's brief cites *Centex Construction Co.*, 258 NLRB 1108 (1981), and states that there “the Board upheld the judge's ruling that Noe was engaged in protected concerted activity in making safety complaints” But to the contrary, the Board stated: “Since we agree with the Administrative Law Judge's conclusion that Noe was discharged for spending excessive time at the water cooler away from his work station, we find it unnecessary to pass on his finding that, prior to his discharge, Noe had been engaged in protected concerted activity.” *Id.*, at 1108, fn. 1.

FINDINGS OF FACT

I. JURISDICTION

5 NASSCO, a corporation, provides ship overhaul services to the United States Navy at its facility in San Diego, California, where it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of California. NASSCO admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

15 NASSCO's shipyard in San Diego covers several square miles; it employs about 3500 rank and file employees. Steven Dykeman is NASSCO's superintendent of rigging. Jeff Padilla was general supervisor and Ronnie Hubrins was production supervisor. By the time of the hearing, Hubrins had returned to a position in the bargaining unit and was no longer a supervisor. Anthony Jemison is manager of employee relations and staffing services. NASSCO's employees are represented by several unions including the Shipyard Workers Union, Local 20 1998, International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO (the Union.) NASSCO and the Union are parties to a collective-bargaining agreement that provides that union stewards are allowed reasonable amounts of unpaid time during normal working hours to investigate grievance and discuss them with employees and managers.

B. Section 8(a)(1) Allegations

30 Paragraph 7 of the complaint alleges that on about October 9 Jemison admonished employees because they had allowed another employee to speak on their behalf regarding work related issues and attempted to discourage employees from engaging in concerted activities by stating that the employees are grown men and can handle issues themselves without the assistance of other employees. In its answer NASSCO indicated as follows:

35 Further, Respondent avers that on or about October 9, 2009, Mr. Jemison reminded a group of employees of the Company procedure for raising work-related concerns. Specifically, Mr. Jemison informed the employees that they could raise concerns directly with their supervisors, that they could raise concerns with their supervisor's Manager, 40 that they could report concerns to their shop steward, that they could raise concerns with another departmental supervisor in whom they had confidence, and/or they could go to the Employee Relations Office. Mr. Jemison also told the employees that they should not bring concerns to Mr. Darnell during company time because Mr. Darnell was not a Steward and interjected himself into other employees' concerns during Company time, 45 without authorization.

50 These alleged violations occurred in a meeting with employees and some background is needed to understand what lead up to this meeting. Joshua Darnell works as a crane operator and rigger for NASSCO. Josh Miller worked at NASSCO from January 2008 to March 18, 2010, as a ship fitter and rigger. He and Darnell often worked together and talked about matters such as the weather and "stuff like that." Miller also raised subjects concerning his employment, such as Padilla's threat to fire him and a malfunctioning switch key. Darnell, Miller and other

employees use the switch key to change the tracks that allow the cranes to get to their destination in the shipyard. Sometimes the head of the key becomes stripped and would no longer fit tightly on the nut and the switch key would pop off as it was being turned, sometimes sending the employee stumbling backwards. The switch key weighs somewhere between 30
 5 and 35 pounds, is shaped in a T fashion, and stands about waist high. Jeff Padilla, NASSCO's general supervisor, acknowledged that the switch key was used frequently and the threads would begin to strip and then he would have to send the switch key to be repaired but "it wasn't done fast enough for Mr. Darnell or for Mr. Miller."

10 On October 7, 2009, Darnell used a switch key to change tracks for a crane and the switch key popped off; he stumbled and nearly fell. According to Darnell he tossed the switch key out of the way using an underhand motion. According to Padilla, he saw Darnell angrily throw the switch key in a one-hand javelin style about 30–35 feet. Darnell was then summoned to Padilla's office where two security guards were waiting with Padilla. Padilla said that he saw
 15 Darnell throw the switch key and said that he could not have that in his shipyard. Padilla asked Darnell to turn over his employee badge, that he was fired. Darnell was then escorted from the premises. This discharge is not alleged to be unlawful.⁴

20 After he was fired, Darnell contacted a number of employees, including Gary Pinkham and Josh Miller, to attend a meeting with Anthony Jemison, NASSCO's manager of employee relations and staffing services, to protest his discharge. They agreed to do so and the meeting was held on October 9, 2009. The meeting began by Jemison pointing his finger at the seated employees and saying that he wanted to admonish each and every one of them for going to
 25 Darnell with their union issues and allowing Darnell to speak on their behalf because Darnell was not part of the Union. Jemison continued by saying "You are grown men; you can handle your issues yourself." The discussion then turned to the incident that led to Darnell's discharge—for allegedly having thrown the heavy switch key some 30 feet, javelin style—triggered laughter and derision among the employees. Then starting with Robert Navarro, shop steward, the employees took turns voicing their support for Darnell. Miller defended Darnell by saying
 30 that Darnell's tossing the switch key over to the side was something that every rigger did every day. Jemison responded by saying that was something that Miller should not bring up because Miller could get in trouble for it. Shortly thereafter NASSCO rescinded Darnell's termination and reduced it to a 3-day suspension.

35 The facts in the preceding paragraph are based on a composite of the credible testimony of Miller, Pinkham, and Darnell. That testimony was mutually corroborative, their demeanor was convincing, and the nature of the testimony seems unlikely to have been invented. I have considered Jemison's testimony concerning the meeting. In some respects his testimony concerning the meeting was similar to the credited testimony described above. Jemison
 40 admitted that he advised the employees that if an employee had an issue or concern, the employee should raise the matter directly with his or her supervisor, or with the supervisor's superior, or with a union steward. Jemison also stated that he told the employees that an employee who is not a union steward is not allowed to discuss issues on company time. Jemison also admitted that he probably said:

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⁴ Darnell has been disciplined on other occasions as well that are not alleged to be unlawful. More recently, on February 17, 2010, Darnell received written notice for being in the riggers Y area when he should have been in another area instead. Hubrins explained that Darnell was
 50 at the riggers Y area speaking with a union representative. The written notice commented "you were counseled numerous times before about your tardiness and not being at your work area in the past."

[W]e're all grown men here. If it were me, being a grown man, I would want to go to the supervisor myself and ask him or her for some time to talk or address the issue.

5 Jemison denied pointing his finger at the employees or saying that he was admonishing them. Importantly, Jemison admitted at trial that in the past he had told Darnell that:

10 I just tried to convey to Josh that he had not been selected as a union steward and so therefore, he couldn't use company time to sort of champion the issues or concerns of others, especially as it relates to discipline. We try to keep discipline, to the extent we can, fairly confidential. It's no one's business, other than the particular employee's. So involving another employee who is not selected as a union steward is not a good practice.

So again, I just asked him to refrain from those types of activities on company time.

15 To the extent that Jemison's testimony put a gloss of the facts inconsistent with the facts described in the preceding paragraph, I do not credit it. It seemed that Jemison selected his words more carefully at trial than he did when conversing with the employees.

20 Analysis

Employees have a right under Section 7 to talk to each other about union matters and working conditions where, as here, the employer does not have a rule limiting discussions among employees to only work-related matters. *Fremont Medical Center*, 357 NLRB No. 158 (2011), slip op. at 2; *Register Guard*, 351 NLRB 1110 (2007), enf. in part sub nom. *Guard Publishing Co v. NLRB*, 571 F. 3d. 53 (D.C. Cir. 2009). In a similar vein, an employer generally may not restrict employees concerning to whom they may voice their workplace issues. *Trinity Protection Services*, 357 NLRB No. 117 (2011), slip op. at 2 and cases cited there. I have described above how Jemison admonished the assembled employees for raising work-related matters with Darnell. By doing so, NASSCO interfered with that right, thereby violating Section 8(a)(1). In its brief NASSCO correctly cites *Brunswick Corp.*, 146 NLRB 1474, 1475 (1965), and similar cases for the proposition an employer may refuse to discuss grievances with employees who were not acting on behalf of the employees' recognized collective-bargaining agent. But those cases miss the point; NASSCO did not simply inform employees that it would discuss formal grievances only with union-designated representatives. Instead, it informed employees that *they* could not discuss their grievances with Darnell. Jemison similarly told the employees that as grown men, they should bring their concerns about working conditions to management or the union officials. But again Section 7 allows employees, even grown men, to discuss these matters among themselves. By telling employees that they should not discuss working conditions with each other, NASSCO again violated Section 8(a)(1).

Paragraph 8 of the complaint alleges that on about October 19, 2009, Jemison attempted to discourage an employee from engaging in union activities by accusing the employee of getting others involved with the Union and causing problems within their department by their union activity, told an employee not to get involved in any other employees' disciplinary issues, told an employee that the employee was not to steer employees towards the Union, and told an employee that the employee was not to discuss union issues unless he was the shop steward. In its answer NASSCO states as follows:

50 Further, Respondent avers that on or about October 19, 2009, Mr. Jemison reminded Mr. Darnell of the Company policy regarding the reporting of employee concerns – i.e. that employees could raise concerns with their supervisor, with their supervisor's

Manager, with a Steward, with another departmental supervisor in whom they had confidence, and/or with the Employee Relations Office. Mr. Jemison also reminded Mr. Darnell that Mr. Darnell was not a Steward and that Mr. Darnell had no status or authorization to solicit complaints or raise concerns under the collective bargaining agreement on behalf of other employees during Company time and in working areas.

The facts supporting these allegations are as follows. Darnell continued to have discussions with Jemison and others concerning the 3-day suspension he received from the switch key incident. One such discussion occurred on October 19; Robert Navarro, union representative, was also present. After some discussion concerning the merits of the 3-day suspension, Jemison became frustrated and turned his attention to Darnell. Jemison shouted that Darnell caused problems for his supervisors because, among other things, Darnell “gear(s)”⁵ people towards the Union and caused problems for his department.” Darnell responded “Well, you act like you work with me. You know, you act like, you know, you’re working with me every day and how can you make these accusations when, you obviously don’t work with me.” Jemison answered that Hubrins, Darnell’s supervisor, was his friend and he and Hubrins sometimes talked about Darnell. Jemison then said that Darnell was not to get involved in anyone’s union activity or discuss any union activity with anyone else because Darnell was not a shop steward.

The facts in the preceding paragraph are based on Darnell’s credible testimony. Jemison denied that he ever told Darnell that he could not take his issues to the Union, but for the same reasons listed earlier in this decision, I do not credit Jemison’s testimony to the extent that it conflicts with the credited testimony.

Analysis

I have described above how Jemison told Darnell not to get involved in anyone’s union activity or discuss any union activity with anyone else because Darnell was not a shop steward. By doing so, NASSCO again violated Section 8(a)(1). Contrary to NASSCO’s assertion in its brief, Jemison did not limit his statement to Darnell to Darnell’s working time. And also contrary to NASSCO’s assertion, it did not merely advise Darnell that he could not stop working to discuss union activity with other employees, something that might have been entirely lawful. I dismiss the other allegations in this paragraph of the complaint because they are not supported by credible testimony.

Paragraph 9 of the complaint alleges that in about the end of October NASSCO, by Ronnie Hubrins, threatened an employee with discharge for engaging in union and other concerted activities. The evidence shows that in October 2009 Pinkham and Darnell were talking in the “riggers Y” area. Hubrins then called Pinkham aside and told him “Don’t be like Josh [Darnell]. Don’t speak up. People are getting fired everyday. You need this job.” Both before and after this event Hubrins made similar statements to Pinkham.

The facts in the preceding paragraph are based on Pinkham’s credible testimony. I have considered Hubrins’ testimony that at first he regarded Pinkham as an outstanding employee but that in 2009 Pinkham’s attitude changed in that Pinkham began to act “like a smart-aleck.”

⁵ The General Counsel has not made a motion to correct the transcript. To the contrary, in his brief he too asserts that Jemison used the word “gear.” I infer that the General Counsel agrees that the record accurately reflects Darnell’s testimony and I am therefore reluctant to correct the record on my own accord.

But interestingly Hubrins was unable, or unwilling, to give much detail concerning the specifics of this alleged change in behavior by Pinkham. I infer that this change in behavior was in fact Pinkham's pattern of involvement with Darnell concerning working conditions. Hubrins admitted that after the change in attitude "I kind of stayed on top of him. You know, like I watched him . . . making sure that he weren't . . . doing anything he shouldn't be doing." Hubrins also admitted that he told Pinkham:

"Gary, you know better" You know I say "You know I depend on you. And . . . you got to watch yourself. You know, you don't need to do nothing to get yourself in trouble."

Hubrins credibly testified that he gave these warnings to Pinkham because he knew Pinkham's family and did not want to see Pinkham get in trouble because he had a lot of respect for Pinkham. However, Hubrins denied that he ever told Pinkham not to be like Darnell. Based on my observation of Hubrins' demeanor, I do not credit that portion of his testimony.

Analysis

NASSCO argues that this allegation in the complaint is not supported by a timely filed charge. Darnell filed a charge that was served on NASSCO on April 6, 2010. So that charge was timely filed if it supports the allegation in the complaint. The charge alleges that NASSCO violated Section 8(a)(1) and (3) as follows:

Within the past six months, the above-named employer, through its agents, officers, and representatives, issued several Written Notices and attendance warnings to its employee Joshua Darnell because of his union and protected concerted activities in challenging warnings issues to employees.

Within the past six months, the above-named Employer, through its agents, officers, and representatives, harassed employee Joshua Darnell with more onerous working conditions because of his union and protected concerted activities in challenging management warnings issues to employees.

I apply *Redd-I, Inc.*, 290 NLRB 1115 (1988), to determine whether charge allegations support the complaint allegation. The charge and complaint allegations involve the same legal theory and sequence of events because they allege a pattern of hostility towards Darnell's protected activity. And NASSCO's defenses would likewise be similar—that it was not hostile to Darnell's protected activities. I conclude the charge comfortably supports the complaint allegation.

As to the merits of the complaint allegation, an employer violated Section 8(a)(1) when it threatens employees with job loss if they engage in union activity. *Trump Marina Hotel Casino*, 353 NLRB 921 (2009). I have described above how Hubrins told Pinkham not to be like Darnell. I have also described above Darnell's involvement with the Union and other workplace issues. I infer, in context, that Pinkham would reasonably understand Hubrins' comments to mean that he should not involve himself in workplace issues and the Union. He coupled these statements with a warning that people were getting fired and Pinkham needed his job. By warning an employee that he risked losing his job if he engaged in union and other concerted activities concerning working condition, NASSCO violated Section 8(a)(1).

Paragraph 10 of the complaint alleges that in or about late January 2010, NASSCO, by Jeff Padilla, threatened to terminate an employee because the employee engaged in concerted activity by challenging the discipline of another employee at a safety meeting of employees. In support of this allegation, the General Counsel presented the testimony of Josh Miller. In response to a leading question by the General Counsel, Miller testified that the matter of Darnell

and the switch key was brought up in January 2010. Miller then described a safety meeting conducted by Padilla and Kevin Luster, a working foreman. In response to a question concerning the “topics” of the meeting, Miller answered “We were going over personal protective equipment.” Near the end of the meeting Padilla asked whether the employees had any questions concerning safety. Miller then pointed out to Padilla that it had been raining a lot lately and he would like to have raingear provided to him; he pointed out that the contract said that employees were to be provided with that gear in inclement weather. Padilla told Miller that Miller had to buy his own raingear. After an objection, the General Counsel then said to Miller “you had mentioned earlier in testimony that there was a threat to fire that happened – January 2010.” But there was no such testimony. Miller then explained that the threat to fire came afterwards and that he was not completely finished with his testimony. The General Counsel persisted, asking Miller to explain how that came about. Miller then testified that Padilla said that he had to take the matter up with someone higher. According to Miller, the next day after the safety meeting Padilla asked Miller and Luster to stay behind for a counseling session. Padilla said that he was not happy with the way Miller brought up safety issues. Miller replied that he was doing exactly what Padilla asked him to do: point out safety issues. Padilla then said that Miller was being insubordinate and that if Miller ever called him out again for anything that Padilla would fire him. Padilla said that Miller could come to him in private. According to Miller, “just the day before” Padilla had said that if Miller did not have proof of something in writing that he could not prove it. So that was why he brought up the matter in front of the entire group of employees. The General Counsel then asked whether Darnell’s name came up at any point; Miller understandably sought clarification by asking whether the question pertained to “that meeting.” After the General Counsel replied “yes” Miller testified:

We had also talked about the fact that he had fired Josh Darnell over the switch key, which had been brought up in another meeting as well. That was one of things he was saying I was being insubordinate about.

I then attempted to begin clarifying the confused record and then turned the matter back to the General Counsel so that he might do so. But this time Miller added that during the second meeting Padilla stated that Miller had been disrespectful and Miller replied that he told Padilla that he did not respect Padilla because Padilla had previously stolen money from him. The General Counsel then persisted in questioning Miller about whether Darnell’s name came up, but that questioning only lead to further confusion in the record. During cross-examination Miller asserted that there was no threat to discharge employees in January 2010; it instead occurred in “October.” Padilla, for his part, testified that during a safety meeting in January 2010, Miller attempted to interrupt the meeting by raising an incident he had with the switch key.

Analysis

In his brief, the General Counsel largely chooses to ignore the confused record. In the absence of a pathway through the confusion I conclude the record is insufficient to support the allegation and I therefore dismiss it.

Paragraph 11 of the complaint alleges that on about May 27, 2010, NASSCO, by Padilla, threatened an employee with a write up after the employee told riggers they needed to be 35 feet away from all hot work. In its answer NASSCO states:

Further, Respondent avers that on or about May 27, 2010, Mr. Darnell was not at the “Rigger’s Y” when roll call was being taken. As a result, Mr. Padilla counseled Mr. Darnell regarding Company policy, and the specific instructions he’s been given previously, requiring him to notify a supervisor and secure proper authorization prior to

leaving the work area. As part of that counseling, Mr. Padilla reminded Mr. Darnell that leaving his work area without notifying a supervisor and securing prior authorization was a violation of the Standard Rules of Conduct and could result in discipline, up to and including termination.

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I now describe the facts concerning this allegation. In late May 2010, Darnell saw two or three riggers 4 to 6 feet away from some hot work; Padilla was also present there. Darnell shouted to the riggers that they need to be 35 feet away from the hot work. Then Darnell addressed Padilla, asking him whether he was going to tell the riggers that they need to be 35 feet away from the hot work. Padilla, apparently wanting to get the job completed, said “I should write you up for instigating.” Padilla admitted that NASSCO has a policy that employees who are not working on hot work should be 35 feet away.

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The foregoing facts are based on Darnell’s credible testimony. I have again considered Padilla testimony. He testified:

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No, sir, I don’t ever recall telling Mr. Darnell to – that he would be threatened in any kind of way. As a fact, I would encourage him to look out for the safety of our employees, but no, sir.

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This testimony and Padilla’s corresponding demeanor are entirely unconvincing and I do not credit it.

Analysis

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Darnell engaged in concerted activity—warning fellow employees—about working conditions—possible safety concerns. In doing so, Darnell was not attempting to set his own terms and conditions of employment. Rather, NASSCO itself recognizes the safety hazards that might result when employees are unnecessarily close to hot work. By threatening to discipline employees for engaging in concerted activity about safety concerns, NASSCO violated Section 8(a)(1).

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C. Section 8(a)(3) Allegation

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The complaint alleges that NASSCO gave Gary Pinkham a written warning because he supported the Union and engaged in concerted activities. As indicated above, Pinkham works for NASSCO as a rigger; he has worked there since 2007. Some background is needed before we get to the written warning. On about May 3, 2010, during a safety meeting of employees Jeff Padilla announced that rigging employees would be required to wear a safety vest. Pinkham expressed his concern that the safety vests were made of polyester and were not flame retardant. This was a concern because the employees were at times required to work in hot areas where there were flames and sparks. Padilla asked Pinkham to help him out and wear the vest. Two days later Pinkham was not wearing the safety vest so Padilla again asked Pinkham to help him out and wear the vest. Pinkham again raised his concerns of the flammability of the vest. Padilla replied that there was a policy from the Safety Department that required employees to wear the vest. After speaking to other employees about the safety vests Pinkham discovered that the crane operators, who sometimes work 200 feet above ground, complained that the vests caused a glare. The glare made it difficult for them to clearly see the hand signals being made by the employees below that guide the crane operations. NASSCO then decided to allow employees to remove the safety vests when they were near hot work. Still later NASSCO replaced the safety vests with fire retardant ones. Padilla admitted that two employees—Pinkham and Darnell—had issues with wearing the safety vests because the vests

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were not fire retardant. Padilla testified that Darnell and Pinkham “wouldn’t wear them. . . . They wouldn’t put them on.”

Also in May 2010 Pinkham prepared and filed a grievance concerning an alleged pay shortage that was signed by him and 18 other employees, including Darnell. Thereafter Pinkham met with Jemison to discuss the grievance; also present were Darnell, Robert Godinez, the Union’s business agent, and Kenny Johnston, the Union’s chief steward. Jemison listened to the presentations and said he would consider the matter and respond later.

On May 28 Pinkham and Darnell were working together at the riggers Y location; they were using a crane to move a pipe unit over to a ship. They rigged the unit and began moving it towards the ship although they did not know exactly where on the ship to place the unit. In the process Padilla called Pinkham on his work mobile phone and asked if Pinkham had called gantry 10 yet. Pinkham answered “Why would I call gantry 10?” Padilla then again asked if Pinkham had called gantry 10 and Pinkham again asked why he would call gantry 10 but this time adding “That’s not my job.” Pinkham then explained that he could not find out where the pipe unit was to be placed on the ship but that he wanted to get the unit to the ship and then determine where it should be placed. Padilla then told Pinkham where to place the unit. Padilla also explained that gantry 10 was on one of the crane ways and gantry 7 was on the other crane way. In other words, the paths to where they had to place the pipe unit were blocked. At that point Darnell took the phone and said that he would call gantry 10 and work out the matter. When Pinkham and Darnell finally arrived with the pipe unit at the proper location on the ship, Pinkham and Darnell removed their safety vests because there was welding being done as they assisted in placing the pipe unit on the ship. They placed their safety vest back on but only when they returned to the riggers Y area.

On June 2 Pinkham was escorted to Padilla’s office by Hubrins; once there Padilla announced that he was giving Pinkham a warning for insubordination. Padilla began reading the warning; it referred to the mobile phone conversation that occurred between Padilla and Pinkham on May 28. This written warning is *not* alleged to be unlawful. After discussing the matter Padilla announced that he was giving Pinkham a second warning for failing to wear his safety vest. This is the written warning at issue in this case. Pinkham protested that there was nothing in the policy that required employees to wear the safety vest. He also raised his concerns about wearing the safety vest near locations where there were flames or sparks. This written warning indicated that it was for “Failure to follow established safety rules or common safety practices.” The location of the violation was: “From Hull 482 to Riggers ‘Y.’” The general statement of the violation was: “On May 28, 2010, you were observed walking Gantry 14 without your department issued safety vest from Hull 482 to the Riggers ‘Y.’” A few weeks later Jemison notified Pinkham that this warning had been removed from his file.

I have considered Padilla’s testimony but I do not credit it to the extent that it is inconsistent with the facts described above. Padilla denied that he issued Pinkham the warning because of the group grievance, described above, that Pinkham had filed. But Padilla’s assertion that he was not aware of the group grievance at the time was both hesitant and unconvincing. According to Padilla he requested that the warning be removed from Pinkham’s file after NASSCO purchased and distributed the new fire retardant vests. NASSCO also placed in evidence a written warning that Padilla prepared for Darnell for failing to wear the safety vest on the same occasion, described above, when Pinkham failed to wear the vest. But that warning, unlike the warning given to Pinkham, was never presented to Darnell. Padilla’s explanation of why that warning was not given to Darnell is simply not believable.

Analysis

I apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) to determine whether the written warning NASSCO gave to Pinkham violated Section 8(a)(3). I have described above how Pinkham engaged in union activity and other concerted activity by filing the group grievance and concertedly raising safety issues about the safety vests. NASSCO knew of the concerted nature of these activities. That NASSCO was hostile to these activities, at least towards the support Pinkham had given Darnell in these matters, is amply shown by the unfair labor practices NASSCO committed. In fact, Pinkham himself was the object of unlawful comments. To be sure, NASSCO's animus is not the generalized antiunion animus. To the contrary, the record shows that it has a long term working relationship with the Union. Rather, NASSCO's hostility was towards the nature of the protected activity that Darnell, Pinkham and others engaged in. The timing of the written warning, after the union and other concerted activity, also lends some support to the General Counsel's case. But the strength of the timing is undermined by the intervention of a much more proximate event—Pinkham's uncooperative attitude towards his supervisor earlier that same day. The General Counsel also argues that under Article 25 of the collective-bargaining agreement Pinkham was privileged not to wear the safety vest. That provision allows an employee not to perform work "Based on objective facts reasonably interpreted that a job assignment is either abnormally unsafe or might unduly endanger an employees' health or safety" But here there is no credible evidence of any facts to support a safety concern on Pinkham's part as he walked back to the riggers Y. Remember, he apparently wore the safety vest to the ship from the riggers Y without raising any safety concerns. And perhaps most importantly, there is no evidence from Pinkham that the reason he did not put on the safety vest after he moved away from the hot work being performed on the ship and reached the riggers Y was in any way related to safety. The General Counsel also argues that Pinkham was the only person to be disciplined for failing to wear a safety vest. But, except for Darnell, there is no evidence that anyone disobeyed the instructions concerning the safety vest. The fact that Darnell was not disciplined actually serves to undermine the General Counsel's case. This is so because the evidence shows that NASSCO was much more upset by Darnell's concerted activities than by Pinkham's supporting role in those activities. It seems that if NASSCO was trying to retaliate against employees because of those activities, Darnell presented it with a perfect opportunity to do so by failing to wear his safety vest. Next, the General Counsel challenges the "underlying rationale" for the safety vest rule. The Board, however, does not second guess employers in the operations of their businesses, at least not here where the lawfulness of the safety vest rule is not directly challenged by the General Counsel. Finally, the General Counsel argues that Pinkham had a right not to wear the safety vest while working near hot wear. I have concluded above, however, that warning was given to Pinkham not because he removed the safety vest while near hot work but because he did not put the safety vest back on after he moved away from the hot work walking back to the riggers Y. That should end the discussion of that issue but NASSCO's brief has breathed new life into that argument because it contends that:

Mr. Pinkham's refusal to wear a safety vest – both around hot work and non-hot work – was in clear violation of the Standard Rules of Conduct.

I recognize that statements made by a respondent in a brief may constitute admissions of a party opponent under the Federal Rules of Evidence. But here I decline to make such findings. The evidence shows that NASSCO did allow employees to remove the safety vests while they were working near hot work. This case does not present a situation where an employee was disciplined for removing a nonflame retardant vest while working near hot work; an entirely

different result might result under that situation. Balancing all these factors I conclude that the General Counsel has met his initial burden under *Wright Line*, but just barely so.

I now examine whether NASSCO has met its burden of showing that it would have issued the written warning even if Pinkham had not engaged in the concerted activities protected by the Act. To do so an employer may not simply point to misconduct committed by an employee to sustain its burden. Rather, it must persuade by a preponderance of the evidence that it would have disciplined the employee for that misconduct. *Cardinal Home Products*, 338 NLRB 1004, 1008 (2003). I first note that Pinkham did, in fact, engage in conduct for which he was disciplined; he failed to wear the safety vest after leaving the hot work area while returning to the riggers Y area. This was in violation of NASSCO's policy and NASSCO could reasonably conclude that Pinkham was being openly defiant of that policy. This is especially so given that Pinkham had been admittedly uncooperative with Padilla during the telephone conversation that lead to the first written warning. Here Padilla had in the past merely verbally counseled Pinkham to wear the safety vest but to no lasting avail. Under these circumstances I conclude that the evidence shows that NASSCO would have given Pinkham the written warning even if Pinkham had not engaged in union and other protected activity. I therefore dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

By the following conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

(a) Admonishing employees for raising work-related matters with another employee.

(b) Telling employees that they should not discuss working conditions with each other.

(c) Telling employees not to get involved in union activity or discuss union activity with anyone else because the employee is not a union steward.

(d) Warning an employee that he risked losing his job if he engaged in union and other concerted activities concerning working condition.

(e) Threatening to discipline employees for engaging in concerted activity about safety concerns.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, National Steel & Shipbuilding Company, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Admonishing employees for raising work-related matters with another employee.

(b) Telling employees that they should not discuss working conditions with each other

(c) Telling employees not to get involved in union activity or discuss union activity with anyone else because the employee is not a union steward.

(d) Warning employees that they risk losing their jobs if they engage in union and other concerted activities concerning working condition.

(e) Threatening to discipline employees for engaging in concerted activity about safety concerns.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days after service by the Region, post at its facility in San Diego, California, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 9, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 26, 2012

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William G. Kocol
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT admonish employees for raising work-related matters with another employee.

WE WILL NOT tell employees that they should not discuss working conditions with each other.

WE WILL NOT tell employees not to get involved in union activity or discuss union activity with anyone else because the employee is not a union steward.

WE WILL NOT warn employees that they risk losing their jobs if they engage in union and other concerted activities concerning working condition.

WE WILL NOT threaten to discipline employees for engaging in concerted activity about safety concerns.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

National Steel & Shipbuilding Company

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

888 South Figueroa Street, 9th Floor

Los Angeles, California 90017-5449

Hours: 8:30 a.m. to 5 p.m.

213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.